REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.96 OF 2019

EOM..... APELLANT

Versus

MLO & SMO (Minors) suing through their next friend and mother,

DMN .....RESPONDENTS

(Being an appeal from the ruling and order of Hon. P. Nyotah (R.M.) dated and delivered on the 5th day of August 2019, in the original Kisii Children's Case No. 61 of 2013)

JUDGMENT

1. The ruling which is the subject of this appeal arose from the appellant's application dated 27th July 2019 where he had sought the following orders;

a. Spent

b. Spent

c. The Honourable court be pleased review, rescind, vary and/or set aside the Judgment and/or Decree of this Honourable Court issued on the 27th day of November 2018 and in lieu thereof, the Honorable Court be pleased to adhere and/or comply with provisions of Articles 27(1) and 53(1) (e) of the Constitution of Kenya, 2010.

d. Consequent to prayer (3) hereinabove being granted, the Honorable Court be pleased to vary, set aside and/or review the sum of Kshs. 30,000/= only decreed to be paid to and/or in favour of the Next Friend of the minors and substitute same with the sum of Kshs. 10,000/= only, being reflective and/or representative of 1/3 salary of the defendant/applicant

e. The Honorable Court be pleased to grant liberty to the parties to apply for further and/or ancillary reliefs.

f. Costs of the instant application be provided for.

2. The suit giving rise to the application had been instituted by the respondent against the appellant seeking maintenance for the two minors, MLO and SMO. The judgment the appellant sought to review was delivered on 27th November, 2018. The trial court, in its decision, ordered the appellant to pay school fees and school related expenses as and when they fell due; provide a suitable in and out-patient medical cover for the minors within 30 days of the judgment and pay Kshs. 30,000/= by 10th day of each month directly to the respondent for the maintenance of the minors.

3. The appellant swore an affidavit in support of his application for review of the judgment complaining that he had been directed to shoulder 90% of the parental responsibility yet the Next Friend was equally in gainful employment. He averred that the Next Friend worked with the County Government of Kisii which had offered her a house and this meant that the Next Friend did not meet any obligations with respect to the children. He, on the other hand, had domestic commitments in favour of his family and various loans and his disposable income amounted to a sum of Kshs. 11,589.80.

4. The appellant claimed that the trial court had given the Next Friend undue latitude to evade parental responsibility which was not only oppressive but also discriminative and contrary to the provisions of the Constitution. He averred that there was a serious error and mistake on the face of the record particularly in terms of the Constitutionality of the judgment which contravened **Article 53 (1) (e)** of the **Constitution**.

He also deposed that the application had been filed timeously immediately following the discovery of the delivery of the illegality and unconstitutionality of the decision.

5. The respondent opposed the application in an affidavit filed on 2nd August 2019. She averred that the trial court rightly decreed that Kshs. 30,000/= was sufficient contribution for maintenance. She also claimed that the respondent had abdicated his parental responsibility towards the children and left her to tend to them with her meager resources since 2013 and it was therefore untenable for the appellant to claim that he had been left to shoulder all parental responsibilities. She averred that he had not brought the application in good faith as he had failed to provide maintenance as directed by the court. She urged that if the court was inclined to grant the orders it should do so on condition that the appellant cleared all the outstanding monies.

6. The trial court in dismissing the application, held that the defendant had not brought any new evidence that was not in his knowledge. He had all along known his income but chose not to provide the court with that information. He had also not shown that there was a mistake or error apparent on the face of the record. The appellant had also failed to attend court or file submissions despite extension of time. Further, the application had been filed 8 months after delivery of judgment. The court held that the maintenance of children was not purely monetary and that the party with custody of the children played more roles which could not be quantified. It also held that the pay slips were not reflective of the appellant's income as he had offered to pay Kshs. 10,000/= yet the net pay indicated in his pay slip was Kshs. 11,589/=. On those grounds, the trial court dismissed the application.

7. The appellant being aggrieved by the foregoing decision of the trial court filed this appeal which was canvassed by way of written submissions.

8. The appellant's learned counsel, argued that the trial court while delivering the judgment did not address itself to the apportionment of parental responsibility and the maintenance of the minor subjects and left it upon the appellant to shoulder the entire responsibility. This was, according to counsel, an error apparent on the face of the record. He submitted that the application for review presented before the trial court had met the legal threshold for review and ought not to have been dismissed.

9. Counsel urged that the appellant had been condemned unheard through no mistake on his part but of his then counsel on record and the mistake of an advocate should not have been visited on him. The award in the judgment was faulted for being excessive given the appellant's source of income as a mere clerk since the appellant had been allocated duties in terms of school and medication and the subject minors were in boarding schools.

10. Opposing the appeal, learned counsel for the respondent submitted that it must not be lost to the court that this is an appeal from a decision dismissing the appellant's application seeking to review or set aside the judgment of the trial court. Thus any attempts by the appellant to use the appeal to attack the merits of the trial court's decision must be resisted.

11. Counsel submitted that the appellant had failed to meet the threshold of an application for review. He did not meet the element of discovery of new evidence and important matter which was not in his knowledge. The appellant filed an amended Statement of Defence in which he dwelt on discounting paternity of the minors and did not plead on his financial ability which was within his knowledge. He also failed to appear before the trial court to adduce evidence in support of his defence for undisclosed reasons and was only awaken from slumber by Warrants of Arrest. Counsel submitted that the appellant's financial ability could not amount to a discovery of new evidence and important matter which was not within the knowledge of the appellant.

12. He further submitted that an erroneous conclusion of law or evidence did not constitute sufficient ground for review. The cases of **Muyodi vs Industrial and Commercial Development Corporation & Another [2006]1EA 243, Origo & Another v Mungala (2005) 2KLR** and **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** were cited in support of this position. Counsel urged that the appellant had also failed to demonstrate the availability of sufficient reason to warrant reviewing the judgment of the trial magistrate.

13. Lastly, counsel submitted that the application for review had been filed 8 months after the decision he sought to review had been delivered. Counsel pointed out that the judgment was delivered in the presence of the appellant's counsel and despite the fact that he was aware of the existence of the judgment, he failed to appeal from the judgment. He observed that the appellant had not explained the reasons for delay in filing the application timeously. His application had therefore been brought with inordinate delay and was properly dismissed by the trial court.

ANAYLSIS AND DETERMINATION

14. The application which is the subject of this appeal was an application for review. **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** empower the court to review its decrees or orders when certain conditions are met.

15. Section 80 provides:

> 80. Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

16. Order 45, Rule 1 of the **Civil Procedure Rules** stipulates;

45. 1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

17. According to the above provisions an applicant seeking to review the court's decree or order, must demonstrate that there has been a discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or that there is some mistake or error apparent on the face of the record or that there was another sufficient reason to review the order or decree. The application must also be filed timeously.

18. The appellant in the instant suit, sought to rely on the ground that there had been an error apparent on the face of the record for the reason that the trial court had failed to consider that parental responsibility is equally shared, in contravention of **Article 53 (1) (e)** of the **Constitution**. He also urged that the court's orders amounted to unlawful discrimination contrary to **Article 27** of the **Constitution**.

19. The courts have defined what constitutes an error apparent on the face of the record in a number of decisions. In ***National Bank of Kenya Ltd vs Ndungu Njau CIVIL APPEAL NO. 211 OF 1996 [1997] eKLR*** the Court of Appeal held;

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

20. In ***Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243***, the Court of Appeal described an error apparent on the face of the record thus:

"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

*(See also **Paul Mwaniki vs. National Hospital Insurance Fund Board of Management [2020] eKLR**)*

21. Noting the principles outlined above, it is apparent that the application for review on the ground that there was an error apparent on the face of record is misplaced. The appellant attacked the decision of the trial court on its merit. He contended that the trial court's application of the law was erroneous as the court failed to consider the provisions of the Constitution. Essentially, his application for review was based on an incorrect exposition of the law by the trial court which is not a good ground for review.

22. The appellant did not also place before the trial court new and important evidence which he had no knowledge of at the time the decree was passed. The proceedings before the trial court show that the respondent testified but the appellant failed to give evidence in support of his case despite having the matter adjourned severally. The appellant's case was closed and judgment delivered in the presence of the appellant's counsel on 27th November 2018. The appellant's financial capacity can hardly be said to be new evidence which was not within his knowledge. In the course of the proceedings, a paternity test had been conducted confirming that the appellant was the biological father of the minors. The appellant did not appear before the court to present evidence on his income and liabilities and cannot claim that he was condemned unheard.

23. With respect to any other sufficient reason, the Court in **Republic vs. Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abullahi Said Sald [2019] eKLR,** held:

"A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Singh and Another [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]

24. The appellant did not demonstrate that there was other sufficient reason to review the decision of the court. Moreover, there was inordinate delay in filing the application for review. The judgment the appellant sought to vary was delivered on 27th November 2018

whereas the application for review was filed on 15th August 2019, more than 8 months after the judgment had been delivered. The appellant made no effort to explain the delay in filing his application.

25. The inevitable conclusion to be drawn from the foregoing discourse is that the appeal is lacking in merit and is hereby dismissed.

26. Each party shall bear his costs as this is a family matter.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF APRIL, 2021

R.E. OUGO

JUDGE

In the presence

Appellant Absent

Mr. Nyanyuki For the Respondent

Ms Jackie Court Assistant